2001

Salt Lake City v. International Association of Firefighters : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY, a Utah municipal corporation, et al, Plaintiffs-Respondents, v. INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCALS 1645, 593, 1654, and 2064, Defendants-Appellants.	)	BRIEF Civil No. 14689

Appeal taken from the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, Judge Sawaya presiding.

BRIEF FOR APPELLANTS

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v.	)	
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NATURE OF THE CASE

Respondents brought this action seeking a declaratory judgment that the Utah Firefighters Negotiations Act, Utah Code Ann., §§ 34-20a-1 et seq. (Supp. 1975), is unconstitutional.

DISPOSITION IN THE LOWER COURT

The lower court granted Respondents' Motion for Summary Judgment and denied Appellants' Motion for Summary Judgment.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the lower court's order granting Respondents' Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment.

In the alternative, Appellants seek reversal of the lower court's ruling that the collective bargaining and compulsory arbitration provisions of the Utah Firefighters Negotiations Act are not severable; and reversal of the lower court's order insofar as it holds that the collective bargaining provisions of the Utah Firefighters Negotiations Act are unconstitutional.

STATEMENT OF FACTS

The Utah Firefighters Negotiations Act, Utah Code Ann., §§ 34-20a-1 et seq. (Supp. 1975) (hereinafter

sometimes referred to as the Act), was passed by Utah's 41st Legislature in its general session and became the law of this State on or about May 13, 1975.

The Act's most controversial sections provide that certain Utah municipalities have a duty to engage in good faith collective bargaining with local firefighter bargaining representatives; and that if a bargaining impasse is reached, "all unresolved issues shall be submitted to arbitration." The Act establishes a procedure for the selection of an arbitration board and: "The determination of the majority of the board of arbitration thus established shall be final and binding on all matters in dispute except in salary and wage matters which shall be considered advisory only."

Refusing to comply with the Act's mandates, Respondent municipalities (hereinafter referred to as Plaintiffs) brought the present action seeking a declaratory judgment that the Act is unconstitutional. The lower court ruled in its Order Granting Plaintiffs' Motion for Summary Judgment that the collective bargaining and compulsory arbitration provisions of the Act were non-severable; and that the Act as a whole was an unconstitutional delegation of the legislative powers of Utah's municipalities. Appellants (hereinafter referred to as Defendants) contend that these two specific and exclusive rulings are in error.

ARGUMENT I

NEITHER FIREFIGHTER/CITY COLLECTIVE BARGAINING NOR COMPULSORY ARBITRATION OF FIREFIGHTER/CITY COLLECTIVE BARGAINING DISPUTES CONSTITUTE MUNICIPAL FUNCTIONS AND, THEREFORE, THE UTAH FIREFIGHTERS NEGOTIATIONS ACT DOES NOT VIOLATE UTAH CONSTITUTION, ARTICLE VI §28.

Plaintiffs contend that the Utah Firefighters Negotiations Act runs afoul of Utah Constitution, Article VI § 28 which provides that:

> The Legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise, or interfere with any municipal improvement, money, property, or effects, whether held in trust or otherwise, to levy taxes, and to select a capitol site, or to perform any municipal functions.

Plaintiffs' contention here assumes that firefighter/city collective bargaining and compulsory arbitration of firefighter/city collective bargaining disputes are "municipal functions" within the meaning of Article VI § 28. However, this Court's past interpretation of Article VI § 28's "municipal function" language reveals that this assumption is unjustified.

The test for ascertaining what is or is not a "municipal function" was most recently set forth by this Court in Tribe v. Salt Lake City Corp., 540 P.2d 499 (Utah 1975). Tribe upheld the Utah Neighborhood Development Act against an Article VI § 28 constitutional attack and noted that the Development Act's

constitutionality hinged on "whether [its] objects and purposes ... are state-wide or local."

> If the legislative enactment authorizes the performance of activities, which qualify as a function appropriately performed by a state agency, the constitutional interdiction of Article VI, Section 28, is not applicable. This section applies only to municipal functions ... . The problem of "urban blight" we recognize as one of state-wide concern, and not merely a local or municipal problem. (Emphasis in original.) Id. at 503.

Applying the Tribe analysis to the present case--Defendants suggest that there are six specific reasons why firefighter/city labor relations are a matter of State-wide and not merely local concern.

(1) Presumption of Constitutionality. Utah Supreme Court decisions unanimously support a presumption of constitutionality for State legislative enactments:

> In determining constitutionality, statutes are presumed to be constitutional until the contrary is clearly shown. It is only when statutes manifestly infringe upon some constitutional provision that they can be declared void. Every reasonable presumption must be indulged in and every reasonable doubt resolved in favor of constitutionality. Broadbent v. Gibson, 105 Utah 53, 62, 140 P.2d 939, 943 (1943).

See also, Branch v. Salt Lake County Service Area No. 2 -- Cottonwood Heights, 23 Utah 2d 181, 460 P.2d 184 (1969). Thus it should be kept in mind that Plaintiffs carry a heavy burden of proof in their attempt to establish the constitutional infirmity of the Act.

(2) Constitutional Policy. Utah Constitution, Article XVI § 8 states that:

> The Legislature may, by appropriate legislation ... provide for the comfort, safety, and general welfare of any and all employees. No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon any commission now or hereafter created such power and authority as the Legislature may deem requisite to carry out the provisions of this section.

If this constitutional provision does not entirely vitiate Plaintiffs' "special commission--municipal function" argument, it is at least persuasive authority for the proposition that labor relations are a matter of State-wide and not merely local concern. This conclusion is reinforced by Utah Constitution, Article XVI § 1's declaration that: "The rights of labor shall have just protection through laws calculated to promote the indistrial welfare of the state." Consonant with this policy declaration, this Court has noted that State minimum wage legislation for public works employees "was passed for the benefit of labor and the protection of society in general ... ." Burr v. Childs, 265 P.2d 383, 386 (Utah 1953).

Likewise, Plaintiffs would not dispute the assertion that establishing working hours is an integral part of labor relations; and yet Utah Constitution, Article XVI §§ 6 and 7 specifically provide that: "Eight hours shall constitute a day's work on all works or undertakings carried on or aided by the state, county, or municipal governments ..." and that the State Legislature shall enforce this constitutional directive by appropriate legislation.

With power to control so many important labor relations problems constitutionally vested in our State Legislature, it is difficult to conclude that firefighter/city collective bargaining and compulsory arbitration of firefighter/city collective bargaining disputes are municipal functions.

(3) Constitutional Power. Whether collective bargaining and compulsory arbitration in the context of firefighter/city labor relations are "municipal functions" can be determined in part by reference to those "powers" conferred on cities by Utah Constitution, Article XI § 5.

Utah Constitution, Article XI § 5 provides in pertinent part that cities are to be created by general laws. These laws may, in turn, be legislatively altered, amended, or repealed. Cities created pursuant to Article XI § 5 are authorized to "exercise all powers relating to municipal affairs, and to adopt and enforce within [their] limits local police, sanitary, and similar regulations" only to the extent that the exercise of such powers and the adoption and enforcement of such regulations is "not in conflict with the general law" as enacted by the State Legislature. (Emphasis supplied.) Express limitation of these municipal powers and, therefore, of municipal functions, is obvious in Article XI § 5's further stipulation that "this grant of authority shall not ... be deemed to limit or restrict the power of the Legislature in matters relating to State affairs, to enact general laws applicable alike to all cities of the state."

This "not in conflict" language has been construed by this Court most recently in Allgood v. Larson, 545 P.2d 530 (Utah 1976). The Court there laid down certain basic principles relative to the issue of State v. municipal powers and functions.

> In Nasfell v. Ogden City, this Court stated that it was committed to the principle that cities have none of the elements of sovereignty and that any fair, reasonable, substantial doubt concerning the existence of the power is resolved by the Court against the corporation (city) and the power denied; grants of power to cities are strictly construed to the exclusion of implied powers which are not reasonably necessary in carrying out the purposes of the express powers granted ... . The State may always invade the field of regulation delegated to the cities and supersede, annul, or enlarge the regulation which the municipality has attempted. It may modify or recall the police power of the city as it may abolish the city itself. Id. at 531 and 532.

According to Allgood, the unmistakable import of Article XI § 5 is that cities are creatures of the State Legislature; that as such their powers are limited to powers expressly or impliedly conferred by State legislative enactment; and that powers expressly or by implication granted to cities do not limit the State Legislature's constitutional authority to enact laws with respect to State affairs generally. See also, Lark v. White head; 28 Utah 2d 343, 502 P.2d 557 (1972); Mountain States Telephone & Telegraph Co. v. Ogden City, 26 Utah 2d 190, 487 P.2d 849 (1971); and State v. Salt Lake City, 21 Utah 2d 318, 445 P.2d 691 (1968).

In a public employer/employee labor relations context, this subordination of municipal to State policy-making power is illustrated by the case of Bohn v. Salt Lake City, 8 P.2d 591 (Utah 1932). There, Salt Lake City had attempted to negotiate contracts for the construction of certain public improvements. These contracts contained restrictive covenants which were designed to ameliorate local unemployment problems and which required contractors to pay laborers a fixed minimum wage and to give preferential hiring treatment to local residents. The Court ruled that the city was without authority to make these covenants and that such covenants were, therefore, illegal and void.

> The power to fix a minimum wage and to prescribe the hours that shall constitute a day's labor are quite generally regarded as an exercise of the police power. [Citations omitted.] This power is inherent in the State. "A municipal corporation has no inherent power to enact police regulations, but derives it solely from the Legislature, and consequently can exercise only such police power as is fairly included in the grant of powers by its charter." [Citation omitted.] Id. at 594.

The Court also invalidated Salt Lake City's preferential hiring policy--not only because the city had no independent authority to entertain such a policy, but also because the State had enacted a law which ordered municipalities to give preferential hiring treatment to "citizens of the United States, or those having declared their intention of becoming citizens." The Court held that this State enactment of policy superceded contrary municipal employment practices. Id. at 595.

Consistent with Article XI § 5, Allgood, and the Bohn Court's delimitation of "municipal powers" and by analogy "municipal functions," Utah's State Legislature has granted cities only a qualified power to organize and regulate fire departments. Utah Code Ann. § 10-8-55 (1953) provides that: "They [cities] may, except as otherwise provided by law, provide for the organization and support of a fire department ... ." (Emphasis supplied.)

Therefore, to the extent the Utah Firefighters Negotiations Act is the general law of the State, cities do not have authority to regulate their fire departments in contravention of said Act. If this authority is lacking, it cannot be said that compulsory arbitration of collective bargaining disputes between firefighters and cities is a "municipal function." A municipality cannot be forced to unconstitutionally delegate a power which it does not possess.

(4) Case Law. Case law also supports Defendants' argument that firefighter/city collective bargaining and compulsory arbitration of firefighter/city collective bargaining disputes are State affairs and, therefore, not municipal functions.

For example, in Midwest City v. Cravens, 532 P.2d 829 (Okl. 1975), a municipality objected to a firefighters' and policemen's arbitration law on the ground that "a classification of police personnel and their terms and conditions of employment were matters of purely municipal concern as

distinguished from general State-wide concern." Id. at 831. The Court, therefore, framed the issue for decision in Midwest City as follows: "Does the Act in question concern merely municipal matters?" Id. at 832. The Midwest City opinion provides an unequivocal answer to this question.

> The Legislature has determined that it is a matter of state-wide concern that the permanent members of any paid fire department ... be accorded the privilege of communicating with their respective employers with a collective voice. In our opinion, the privilege of communicating with their respective employers with a collective voice involves a matter of state-wide concern and the Act authorizing them to speak through a collective voice supersedes any charter provision to the contrary. Id. at 834.

Likewise, in Professional Fire Fighters, Inc. v. City of Los Angeles, 32 Cal. Rptr. 830, 384 P.2d 158 (1963), the California Supreme Court upheld a firefighter/city collective bargaining statute against a constitutional challenge which was based on a constitutional provision identical to Utah Constitution, Article VI § 28.

> The basic question to be determined is whether or not the matters embraced by the Code sections are ... exclusively municipal affairs ... . In urging that the matters embraced in the Code sections are of a purely local concern, both the trial Court and the defendant rely upon a number of authorities which, they contend, hold that all matters connected with public employment in a chartered city are municipal affairs [citations omitted]. None of these cases, nor any other similar cases, relied upon by defendant, hold that all matters connected with public employment in a chartered city are exclusively municipal affairs in which the State has no concern. Each deals with a specific phase of City employment, and each holds that the phase there under consideration is a municipal affair ... . Because the various sections of Article XI fail to define municipal affairs, it becomes necessary

> for the Courts to decide, under the facts of each case, whether the subject matter under discussion is of municipal or state-wide concern. This question must be determined from the legislative purpose in each individual instance. In the instant case, it would appear that the Legislature was attempting to deal with labor relations on a state-wide basis ... . Labor relations are of the same state-wide concern as workman's compensation ... . Id. at 32 Cal. Rptr. 838-39, 384 P.2d 166-67.

If firefighter/city collective bargaining is held to be a matter of State-wide concern, then it would seem that compulsory arbitration of collective bargaining disputes, an equally integral part of labor relations where vital public services such as fire protection are involved, is likewise a matter of State-wide concern.

Thus, New York's firefighter/city compulsory arbitration law has been held to supersede what might otherwise be considered municipal prerogatives because: "The Legislature may act by general law in areas of general state concern, even though the enactment may touch upon the property, affairs, or government of municipalities and circumscribe local authority in that area." City of Corning v. Corning Police Department, 81 Misc. 2d 294, 299, 366 N.Y.S. 2d 241, 246 (Sup. Ct. 1974).

Similar reasoning has been employed to constitutionally validate Wyoming's firefighter/city compulsory arbitration law:

> ... A city, as a creature of the Legislature, has only such powers as have been granted to it by the State. Thus, the Legislature could authorize a city to employ and pay firemen, and it could place limitations upon the manner in which pay and working conditions shall be arrived

> at. Recognition of the principle of compulsory arbitration, when collective bargaining fails is quite common in business and industrial affairs. We have seen contracts between labor and management wherein provisions for arbitration of unresolved disputes were contained. It has never been suggested that the carrying out of such arbitration is a performance of a "municipal function." Even though one of the parties in the arbitration ... is a city, the act of arbitration is no different from the act of arbitration in business and industrial affairs. It is nothing more than the performance of arbitration, and it cannot be said to be the performance of a municipal function. State ex rel. Fire Fighters Local No. 746, I.A.F.F. v. City of Laramie, 437 P.2d 295, 300 (Wyo. 1968).

Likewise, the Supreme Court of Maine has found that:

> ... our constitution gave the Legislature full responsibility over the subject matter of public schools and education and empowered it to make all reasonable laws in reference to schools and education for the "benefit of the people of this State." [citation omitted]. Except for the areas where the Legislature has from time to time seen fit to impose its own requirements ... the responsibilities for operating the public schools have remained in the local school boards. The Legislature has now decided to take from the school boards the ultimate authority they have exercised in certain areas of school management -- that is, as to "hours, and working conditions" and contract grievance arbitration -- and to give it to ad hoc boards of arbitration ... there can be no doubt but that the Legislature, which is the source of all municipal authority [citation omitted], has also the power to take back from municipal officers portions of the authority it has earlier given them. City of Biddeford v. Biddeford Teachers Association, 304 A.2d 387, 397-98 (Me. 1973).

A formidable line of authority concurs in the rationale adopted by the New York, Wyoming and Maine courts in upholding compulsory arbitration statutes similar to the Act involved in the present case against constitutional

challenges based on constitutional provisions identical or virtually identical to Utah Constitution, Article VI § 28. At least twenty-three states have enacted collective bargaining and compulsory arbitration statutes to govern public employer/employee labor disputes (Alaska, Iowa, Louisiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, Nebraska, New York, Nevada, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming). At present, ten State Supreme Court decisions have dealt with the constitutionality of either the collective bargaining or compulsory arbitration provisions of these statutes. All but one of these decisions (South Dakota) has upheld the constitutionality of these statutes.*

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*See Professional Firefighters, Inc. v. City of Los Angeles, 32 Cal. Rptr. 830, 384 P.2d 158 (1963); City of Biddeford v. Biddeford Teachers Association, 304 A.2d 387 (Me. 1973); Dearborn Fire Fighters Union, Local No. 412, I.A.F.F. v. City of Dearborn, 394 Mich. 239, 231 N.W.2d 226 (1975); School District of Seward Education Association v. School District of Seward, 188 Neb. 772, 199 N.W.2d 752 (1972); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290 (1975); Midwest City v. Cravens, 532 P.2d 829 (Okl. 1975); Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969); City of Warwick v. Warwick Regular Fireman's Association, 256 A.2d 206 (R. I. 1969); State ex rel. Fire Fighters Local No. 746, I.A.F.F. v. City of Laramie, 437 P.2d 295 (Wyo. 1968); City of Buffalo v. New York State Public Employment Relations Board, 363 N.Y.S.2d 896 (Sup. Ct. 1975); City of Corning v. Corning Police Dept., 81 Misc. 2d 294, 366 N.Y.S.2d 241 (Sup. Ct. 1974); and City of Spokane v. Spokane Police Guild and Local No. 29 I.A.F.F., CCH Labor L. Rpt. State Laws Vol. 3 ¶ 53, 818 (Wash. Super. Ct., April 16, 1975). See also, Detroit Police Officers Association v. Detroit, 391 Mich. 44, 214 N.W.2d 803 (1974); People v. Local 365, Cemetery Workers, 33 N.Y.2d 582, 301 N.E.2d 434 (1973);

(5) Policy Reasons. Plaintiffs have complained repeatedly throughout the course of the present litigation that compulsory arbitration of firefighter/city collective bargaining disputes will eventuate in "taxation" of Salt Lake City residents "without representation." Although "compulsory taxation" of this sort seems rather improbable under the Utah Firefighters Negotiations Act (the arbitration panel's decisions relative to salaries and wages are advisory only), nevertheless Plaintiffs' preoccupation with the interest of Salt Lake City taxpayers seems unjustifiably narrow. Plaintiffs' "taxation without representation" argument ignores other more substantial public interests in the maintenance of sound firefighter/city labor relations. These other interests, in turn, suggest that regulation of firefighter/city labor relations is a matter of State-wide and not merely local concern.

Mt. St. Mary's Hospital v. Catherwood, 26 N.Y.2d 493, 260 N.E.2d 508 (1970); and State ex rel. Fire Fighters Local 279, I.A.F.F. v. Kingham, 420 P.2d 254 (Wyo. 1966). Cf. Luhrs v. City of Phoenix, 83 P.2d 283 (Ariz. 1938); Fire Fighters Union, Local 1186, I.A.F.F. v. City of Vallejo, 116 Cal. Rptr. 507, 526 P.2d 971, 981 n. 13 (1974); Huff v. Mayor and City Council of Colorado Springs, 512 P.2d 632 (Colo. 1973); Board of Trustees of P. and F. R. F. v. City of Paducah, 333 S.W.2d 515 (Ky. 1960); Rockland Professional Firefighters Association v. City of Rockland, 261 A.2d 418 (Me. 1970); Kentucky Municipal League v. Commonwealth Dept. of Labor, 530 S.W.2d 198 (Ky. Ct. App. 1975); and City of Brookfield v. Wisconsin Employment Relations Commission, 87 LRRM 2099 (Wisc. Cir. Ct., June 21, 1974). See generally 56 Am. Jur. 2d Municipal Corporations § 133 (1971) and 62 C.J.S. Municipal Corporations § 592 (1949). But see, City of Sioux Falls v. Sioux Falls Firefighters, Local 814, 234 N.W.2d 35 (S. D. 1975). But cf. Erie Firefighters Local No. 293 v. Gardiner, 406 Pa. 395, 178 A.2d 691 (1962).

(a) It is entirely obvious, for instance, that the nature of firefighter/city labor relations will affect the quality of fire protection in Utah's municipalities. See Luhrs v. City of Phoenix, 83 P.2d 283 (Ariz. 1938). Many people who live in or outside Utah visit or own property or businesses situated in Utah's municipalities. These people, businesses, and property have an interest in the quality of fire protection afforded by these municipalities; and this interest is certainly commensurate with whatever independent interest Salt Lake City's taxpayers have in the regulation and ordering of Utah's municipal fire departments. Moreover, this "public-at-large" interest has been expressly recognized in the Utah State Fire Prevention Law, Utah Code Ann. §§ 63-29-1 et seq. (1953), the declared purpose of which is to provide for the adoption and enforcement of Uniform Codes for prevention of, and protection from fire disaster and other hazards in the political subdivisions of this State. May the cities, then, tell the State, "We will unilaterally determine the fire protection needs of these people, businesses, and properties, and give them such protection as we think best?" Unless the answer to this question is "no"--the fraction of Utah's citizenry who are residents of plaintiff municipalities will dictate fire protection policy for the majority of Utah's residents. Thus Defendants suspect that Plaintiffs are not entirely sincere in their reliance on "taxation without representation" principles of majoritarian political democracy

as support for their anti-firefighter/city collective bargaining arguments.

(b) A corollary argument in this regard is, of course, that State buildings, facilities, universities, and other State properties are dependent for their fire protection on municipal fire departments.

(c) Likewise, many municipal fire departments service areas beyond municipal boundaries. In recognition of this fact, Utah Code Ann. § 11-7-1 (1953) specifically authorizes the interchange of fire protection responsibilities between Utah's cities, counties, private corporations, fire districts, and federal governmental agencies. Thus it has been argued that the extraterritorial character of a municipal service constitutes the "point of delineation" between areas of State-wide and purely local concern. From this perspective, the decisive test for finding a municipal function "was whether the function dealt specifically with a problem within the corporate territorial limits and which affected the inhabitants thereof. When the community so handles the problem that it affects others beyond the corporate limits or the inhabitants of the state generally, the matter becomes a state affair." Branch v. Salt Lake County Service Area No. 2--Cottonwood Heights, 23 Utah 2d 181, 192, 460 P.2d 814, 822 (1969) (J. Callister, dissenting opinion).

(d) In addition to the extraterritorial nature of fire protection services--the State, as overseer of the State economy, has a continuing interest in the wage

scales, working hours, and working conditions of public and private employees. Cf. Burr v. Childs, 265 P.2d 383 (Utah 1953); McCrew v. Industrial Commission, 96 Utah 203, 85 P.2d 608 (1938); and Bohn v. Salt Lake City, 8 P.2d 591 (Utah 1932).

(e) State regulation of firefighter/city labor relations is desirable for purposes of establishing uniformity. Allowing municipalities to deal independently with local fire departments will necessarily lead to a hodgepodge, uneven bestowal of bargaining rights. This situation would invite confusion; the feeling among firefighters that they are being treated unfairly; and possibly even lawsuits grounded on equal protection claims.

(f) Similarly, the State has an interest in guaranteeing State-wide, industrial peace; especially where the distribution of essential public services is concerned. Industrial peace, however, can be obtained only at a certain price; viz. interposing balance in the public employer/employee collective bargaining process so that public employers can no longer unilaterally and arbitrarily impose standards relative to working hours and working conditions on public employees.

> The Legislature has apparently concluded ... that experience has taught that certain aspects of this dynamic and complicated municipal employer-employee

> relationship no longer need remain subject to arbitrary decision by the employer, and that in the area of working conditions and hours and of contract grievances, the interests of the employees must in fairness be examined by impartial persons. The Legislature appears to believe that this much can be done without serious disruption of the balancing of operating costs against municipal appropriations ... we are of the opinion that the Legislature, mindful of the denial to municipal employees of such economic weapons as strikes and work stoppages which are available to employees in private employment, have sought to avoid the disruptive feelings of resentment and bitterness which may result if the governmental employee may look only to the government for redress of his grievances. City of Biddeford v. Biddeford Teachers Association, 304 A.2d 387, 398 (Me. 1973).

Many commentators have concurred in the Maine Supreme Court's judgment that compulsory arbitration is an effective and harmonious means of preventing the otherwise deleterious impact of strikes in the public sector. Among those commentators we find many of Utah's "founding fathers."

> Many strikes may be averted in this way and there will be a large loss of life and property, and I think it can be very largely avoided, if we have a provision which will create a board of conciliation and arbitration ...
>
> It was always a one-sided affair if we [employers] had any difficulty with our laboring men. They have demanded certain hours and certain amount of wages per month, and if we did not like it, they say, "we will go out, we will quit." The consequence was we looked around for some other skilled labor to take these gentlemen's places, if they would insist upon it. We found we could not obtain that kind of labor which is desirable for our business, therefore, we were handicapped and the consequences have been we have had to give in every time. We had no arbitration. It was merely a matter of a bulldozing arrangement, and therefore I hope the striking out will not prevail, and such a matter as this is asked for [compulsory arbitration of labor

disputes] will be put in our constitution. Official Report Of The Proceedings And Debates Of The Convention Assembled At Salt Lake City On The Fourth Day Of March 1895, To Adopt A Constitution For The State Of Utah, Vol. II, 1033 and 1040 (1898).

See also, Dayton Classroom Teachers Assn. v. Dayton Board of Education, 41 Ohio St. 2d 127, 323 N.E. 2d 714 (1975); City of Spokane v. Spokane Police Guild and Local No. 29 I.A.F.F., CCH Labor L. Rpt. State Laws Vol. 3 ¶ 53, 818 (Wash. Super. Ct., April 16, 1976); and McAvoy, "Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector," 72 Col. L. Rev. 1192 (1972).

For the policy reasons outlined above, Defendants conclude that the collective bargaining and compulsory arbitration provisions of the Utah Firefighters Negotiations Act are matters of State-wide and not merely local concern and that said Act should be declared constitutional.

(6) Case Law And Policy Reasons Cited By Plaintiffs In Support Of Their Assertion That The Act Violates Utah Constitution, Article VI § 28 Are Not Compelling.

(a) Plaintiffs' Case Law. It has already been established that firefighter/city labor relations are a matter of State-wide rather than purely municipal concern. This conclusion is further supported by a long line of Utah cases which have held that where a valid exercise of State police power is concerned, strict construction of Article VI

§ 28 is necessary to insure state sovereignty. In the absence of an express or clearly implied surrender to cities of the power in question, the State retains that power. See Ogden City v. Public Service Commission, 123 Utah 437, 260 P.2d 751 (1953); Provo City v. Department of Business Regulation, 118 Utah 1, 218 P.2d 675 (1950); Riggins v. District Court of Salt Lake County, 89 Utah 183, 51 P.2d 645 (1935); City of St. George v. Public Utilities Commission, 62 Utah 453, 220 P. 720 (1923); and Salt Lake County v. Salt Lake City, 42 Utah 548, 134 P. 560 (1930).

Cases relied upon by Plaintiffs in the lower court proceedings such as State Water Pollution Control Board v. Salt Lake City, 6 Utah 2d 247, 311 P.2d 370 (1957), Backman v. Salt Lake County, 13 Utah 2d 412, 375 P.2d 756 (1962), and Gord v. Salt Lake City, 20 Utah 2d 138, 434 P.2d 449 (1967), are not to the contrary.

In State Water Pollution Control Board, this Court expressly confined its definition of Article VI § 28's municipal function language to "such matters [as] are conducted in a manner which [does not] threaten pollution of water beyond the confines of the city." State Water Pollution Control Board v. Salt Lake City, 6 Utah 2d 247, 255, 311 P.2d 370, 375 (1957). See also, Branch v. Salt Lake County Service Area No. 2--Cottonwood Heights, 23 Utah 2d 181, 192, 460 P.2d 814, 122 (1969) (J. Callister, dissenting opinion). Moreover, the Court's broad reading of Article VI § 28's

municipal function language in State Water Pollution Control Board occurred during the Court's discussion of the proprietary v. governmental dichotomy relative to municipal immunity in tort actions and not in the context of the State v. municipal sovereignty issue which is the frame of reference for the present case.

This Court has specifically noted that the Backman language relative to Article VI § 28 is dictum and, therefore, not controlling. See Branch v. Salt Lake County Service Area No. 2--Cottonwood Heights, 23 Utah 2d 181, 186, 460 P.2d 814, 817 (1969). Nevertheless, the Backman Court observed that cases legitimizing State intervention in local affairs are "obviously predicated on the assumption that because of the magnitude of the ... project, which could not have been accomplished by a single municipality, coupled with state-wide concern and interest ... together with the fact that such act was not only general and uniform, calling for such promotion coterminus with any city or county, but available for many cities and counties, overlapping or noncontiguous, there was no special commission performing a municipal function." (Emphasis in original omitted.) Backman v. Salt Lake County, 13 Utah 2d 412, 419, 375 P.2d 756, 760-61 (1962).

Both State Water Pollution Control Board and Backman, therefore, reinforce Defendants' assertion here that the dictates of Article VI § 28 must give way to the

dictates of Article XI § 5 where the nature of firefighter/city labor relations affects the public-at-large and the State generally.

Gord v. Salt Lake City, 20 Utah 2d 138, 434 P.2d 449 (1967), has a similarly inconclusive bearing on the present case because: (1) Gord's discussion of Article VI § 28 is clearly dictum and (2) close examination of the Briefs filed in the Gord case reveals that this Court was not instructed on the constitutional interplay of Article VI § 28 and Article XI § 5. Therefore, the Court was not given an opportunity to consider all relevant Utah law in arriving at its decision in the Gord case.

(3) More importantly, however, Plaintiffs are suggesting by their reliance on Gord that the entire functional area of municipal employer/employee labor relations should be designated as a "municipal concern." But even if we accept this "functional area" approach to the "municipal concern" problem, Gord has little relevance to the present case. First, it is obvious that appeal procedures for employee discharges involved in Gord and collective bargaining and compulsory arbitration procedures involved in the present case are functionally distinct processes. And second -- whereas Gord dealt with the discharge of a city cemetery worker, we are dealing in the present case with firefighters -- a distinct category of public employees who perform a distinctly State-oriented

public service. The very statute which the Gord opinion construed points up this distinction.*

Moreover, in Tribe v. Salt Lake City, 540 P.2d 499 (Utah 1975), this Court emphasized that "municipal concerns" were ascertained not through some "functional area" test, but rather by asking whether the activities in question were "more appropriately performed by a state agency." Id. at 503. Thus a more isolated subject such as the employee discharge for incompetence involved in Gord may more appropriately be handled by local authorities while firefighter/city labor relations problems which have broader State-wide dimensions are more appropriately handled in accordance with State legislative policies. See Professional Firefighters, Inc. v. City of Los Angeles, 32 Cal. Rptr. 830, 384 P.2d 158 (1963).

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*The Gord opinion interpreted language from Utah Code Ann. § 49-2-5 (1953) which dealt with appeal procedures for certain classes of discharged municipal employees. Utah Code Ann. § 49-2-4 (1953), however, makes it clear that the appeal mechanism provided under § 49-2-5 is not applicable to firefighters: "All appointive officers and employees of cities of the first, second, and third class and incorporated towns, other than members of the police and fire departments and heads of departments, superintendents, shall hold their employment without limitation of time, being subject to discharge or dismissal only as hereinafter provided [in § 49-2-5. (Emphasis supplied.) Firefighters are members of the classified civil service and are thus amenable only to the discharge procedures found at Utah Code Ann. § 10-10-21 (1953). Not only do firefighters constitute a distinct class of employees by virtue of their separate civil service classification, but also firefighters constitute a distinct class of employees by virtue of the essential nature of fire protection services which they render.

Cases cited from other jurisdictions and relied upon by Plaintiffs as authority for their Article VI § 28 claim are equally inapposite. Plaintiffs, for instance, rely heavily on State v. Johnson, 278 P.2d 662 (Wash. 1955). This case does not detract from Defendants' arguments in the present case, but rather it supports those arguments. Plaintiffs have looked only superficially to the Washington Court's conclusion that the compulsory arbitration provision involved in that case was unconstitutional and have overlooked the Court's reason for arriving at that conclusions. In Johnson, the municipality involved had amended its own charter to provide for compulsory arbitration of firefighter/city collective bargaining disputes. Unlike the present situation in Utah, the State of Washington had not expressly conferred upon Washington municipalities the right to arbitrate as a means of firefighter/city impasse resolution. Employing precisely the same line of argument which Defendants have detailed in the foregoing provisions of this Brief, the Johnson Court:

> ... noted ... that the [city] charter provision [providing for compulsory arbitration of firefighter/city collective bargaining disputes] itself must be "consistent with and subject to the constitution and laws of this State." ... Although the people ... are granted the right to set up a charter to rule themselves ... that charter cannot run counter to the constitution or laws of the State which gave them the right to enact it ... It has many times been held that charter provisions of a city may be superseded by general laws of the Legislature ... Id. at 665.

This language makes it clear that the Court struck down as unconstitutional the compulsory arbitration provision involved in Johnson not because resolution of firefighter/city collective bargaining disputes was necessarily a "municipal affair" but because the State's statutory policy of making such resolution a municipal affair had been circumvented by the city's amendment to its charter in Johnson. Thus the Johnson decision underlines the supremacy of State policy-making powers with respect to firefighter/city labor relations. See especially the discussion of the Johnson case contained in State ex rel. St. Louis Fire Fighters Association, Local No. 73, AFL-CIO v. Stemmler, 479 S.W. 2d 456, 460 (Mo. 1972).

This supremacy is further evidenced by a post-Johnson Washington court opinion, City of Spokane v. Spokane Police Guild and Local No. 29 I.A.F.F., CCH Labor L. Rpt. State Laws Vol. 3 ¶ 53, 818 (Wash. Super. Ct., April 16, 1975), wherein a State legislative enactment similar to Utah's Fire Fighters Negotiations Act was upheld against constitutional attack because:

> The premise that the public health, safety, and welfare is a matter of great concern to all of the citizens of the State of Washington is one of the principles the court felt compelled to consider along with the fact that the uniformed employees are giving up a bona fide, important right; that is, the right to strike and were receiving in place of this valuable right a binding arbitration procedure.

Plaintiffs place similarly heavy reliance on reasoning found in City of Springfield v. Clouse, 206 S.W. 2d 539 (Mo. 1947).

The Clouse opinion dealt with a city's power to enter into collective bargaining agreements with municipal employees and did not deal with the compulsory arbitration of collective bargaining disputes between cities and their employees. The Court ruled that cities in Missouri do not have power to enter into collective bargaining agreements with their employees because: (1) the setting of compensation and working conditions for any public service involves the exercise of municipal legislative powers; (2) the city cannot delegate these municipal legislative powers; and (3) collective bargaining agreements between cities and their employees constitute a delegation of municipal legislative powers. The Court advances no reason whatsoever for its conclusory observation that collective bargaining agreements between cities and their employees constitute a delegation of municipal legislative powers. If this is the case, however, other kinds of municipal contracts would appear to be equally violative of the Court's delegation doctrine. Contracts for the construction of a city library or a city art center are contracts for a public service and, therefore, involve the exercise of municipal legislative power no less than contracts between cities and their employees. Would a court seriously entertain the highly impractical thought that municipalities are precluded from negotiating and entering

into such contracts because once a municipality is bound thereby it loses some sort of legislative discretion? Plaintiffs themselves would be reluctant to admit to such a far-reaching proposition. Defendants conclude, therefore, that the Clouse Court's leap of faith from step (2) to step (3) of the syllogism outlined above is totally unjustified.

Moreover, as in the Johnson case, the Clouse Court's opinion was ultimately bottomed on the principle that the city involved there had no power to bargain collectively because the State Legislature had not expressly granted the city such power:

> Missouri cities have or can exercise only such powers as are conferred by express or implied provisions of law; their charters being a grant and not a limitation of power, subject to strict construction, with doubtful powers resolved against the city. ... it seems obvious that, under the civil service laws applicable to the city, it must deal with all of its employees, regardless of kind or classification on exactly the same basis and that is by the exercise of its legislative powers in accordance with the conditions fixed by the general assembly. This clearly leaves the city no authority to deal with any employees involved herein on a collective bargaining contract basis. (Emphasis supplied.) City of Springfield v. Clouse, 206 S.W. 2d 539, 546-47 (Mo. 1947).

State policy-making supremacy in the area of firefighter/city labor relations is the underlying theme of the Court's decision. It is apparent that if State enabling legislation were passed in Missouri, providing for State usurpation of what had hitherto been State-granted municipal prerogatives relative

to firefighter/city labor relations, Missouri municipalities would have to accede to the new State legislative commands just as they were forced to accede to old State legislative commands in Clouse.

(b) Plaintiffs' Policy Reasons. Plaintiffs devoted considerable time in the lower court proceedings describing the horrific consequences which allegedly would flow from compulsory arbitration of firefighter/city collective bargaining disputes. Examples of budget-breaking arbitration awards in a dispute involving Oakland City and local firefighters there were drawn from newspaper and magazine accounts.

Defendants cannot overstress the irrelevance of these arguments and examples. First, under Utah's Act, the arbitration board's decisions relative to wages and salaries are advisory only, whereas such decisions are binding under Oakland's charter provision governing the arbitration of firefighter/city collective bargaining disputes. In any event, questions as to the nature and extent of arbitrators' awards under Utah's Act are premature, speculative, and remote.

Second--contrary to Plaintiff municipalities' claim that compulsory arbitration of firefighter/city collective bargaining disputes would constitute a radical and unconscionable departure from the present division of State/city administrative responsibilities--it is apparent

that Plaintiff municipalities tolerate innumerable instances of State interference in what otherwise might be described as areas of municipal concern.

For example, municipal legislative bodies cannot easily remove local civil service commissioners, see Utah Code Ann. § 10-10-12 (1953), and yet these commissioners are given final and binding power to decide questions involving the discharge of employees in the classified civil service, see Utah Code Ann. § 10-10-21 (1953). Similar examples of State legislation which establishes commissions with regulatory powers impinging on areas of municipal concern can be found in the Utah Firemen's Retirement Act, Utah Code Ann. §§ 49-6a-1 et seq. (Supp. 1975); the State Workmen's Compensation Law, Utah Code Ann. § 35-1-43(1) (1953); the Utah Occupational Safety and Health Act of 1973, Utah Code Ann. §§ 39-9-3(5) and (8) (1953); and the Utah Anti-Discriminatory Act, Utah Code Ann. §§ 34-35-2(2), (5), and (6) (1953); and compliance with each of these laws entails considerable municipal expense.

Public transit districts which are essentially subentities of Utah municipalities, Utah Code Ann. §§ 11-20-4 to -7 (1953), must submit irresolvable labor disputes with their employees to arbitration under the Utah Public Transit District Act, Utah Code Ann. § 11-20-32 (1953).

And finally, although no special commission is involved, Utah municipalities are required by State law to bear the administrative expense of a dues check-off procedure whenever requested by public employee union members, Utah Code Ann. § 34-32-1 (1953). See UTEA v. Brigham City, P-H Public Personnel Administration L-M Relations Vol. 4 No. 21.18, April 13, 1976 (Utah 1st Jud. Dist. Ct. Box Elder County, February 9, 1976).

Judging by the realities of day-to-day municipal employer/employee labor relations, it becomes apparent that the State plays a dominant, intrusive role in governing those relations. These realities likewise make it clear that the "parade of horribles" argument advanced by Plaintiffs in the lower court proceedings is primarily the figment of Plaintiffs' biased imagination.

Third and most fundamentally--Plaintiffs' "parade of horribles" argument should not be considered by this Court in arriving at its decision in the present case because said argument deals with questions of policy more appropriately handled by the legislative branch of our State government. The question before this Court in the present case is not--as the Oakland City experience implies--whether compulsory arbitration of firefighter/city collective bargaining disputes should be the law of this State or whether it will have a financially oppressive impact on Plaintiff municipalities. The question before this court is whether the State Legislature had the constitutional

power to pass the Utah Firefighters Negotiations Act--regardless of any consequences, fortunate or unfortunate, which might accrue because of said Act's implementation. Defendants are confident that the State Legislature was possessed of such constitutional power when it enacted the Utah Firefighters Negotiations Act.

ARGUMENT II

THE COLLECTIVE BARGAINING AND COMPULSORY ARBITRATION PROVISIONS OF THE UTAH FIREFIGHTERS NEGOTIATIONS ACT ARE SEVERABLE.

The Act's collective bargaining and compulsory arbitration provisions are severable for both functional and constitutional reasons.

First, it should be obvious that collective bargaining and compulsory arbitration are functionally independent processes. It is possible to impose a duty to bargain collectively on the various parties to a labor dispute and at the same time provide both parties with remedies or with no remedies when one party refuses to bargain in good faith or when a bargaining impasse is reached. These remedies can be either express or implied and include, inter alia, strikes, work stoppages and slow downs, mediation, conciliation, voluntary and compulsory interest arbitration, voluntary and compulsory grievance arbitration, or court injunctions. These impasse resolution

procedures, however, are not necessary to the existence of collective bargaining. The Legislature could have intended that, in the absence of any impasse resolution procedure, parties to a particular labor dispute would remain deadlocked and fail to negotiate a contract, or that such parties should be left to find their own remedies through exertion of economic and legal pressures of their own and not the State's creation.

Second--from a political and constitutional perspective--there is a qualitative difference between the impact and effect of collective bargaining and compulsory arbitration. Under a regime of collective bargaining, the public employer retains ultimate power to approve or disapprove a proposed agreement, and the decision is, therefore, arguably a product in part of political influence. In the case of binding interest arbitration, however, public employers are forced to surrender this power into the hands of a neutral arbitration board--and to this extent traditional rules of political accountability may be weakened.

Finally, a duty to bargain collectively does not require the interposition of a "special commission" under Article VI § 28--whereas compulsory arbitration may in the form of an arbitration board.

For these reasons Defendants suggest that collective bargaining and compulsory arbitration are distinct and severable legal concepts and that it would therefore

be appropriate for the Court to reverse the lower court's order in the present case insofar as that order holds the collective bargaining provisions of the Utah Firefighters Negotiations Act unconstitutional.

CONCLUSION

Based on the foregoing reasons, Defendants respectfully submit that the lower court's judgment in the present case should be reversed as requested by Defendants on this appeal and that the Utah Firefighters Negotiations Act should be declared constitutional by this Court.

DATED this 23 day of September, 1976.

/s/
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CERTIFICATE OF MAILING

The undersigned hereby certifies that a copy of the foregoing was mailed on the _____ day of September, 1976, to: Roger F. Cutler, Attorney for Plaintiffs Salt Lake City, Evan Baker, and Harold Newman, 101 City and County Building, Salt Lake City, Utah 84111; Glen J. Ellis, Attorney

for Plaintiff Provo City, Box 1097, Provo, Utah 84601; Jack A. Richards, Attorney for Plaintiff Ogden City, P. O. Box 9699, Ogden, Utah 84409; Merrill G. Hansen, Attorney for Plaintiff Murray City, 5461 South State Street, Murray, Utah 84107; and J. Blaine Zollinger, Attorney for Plaintiff Logan City, 61 West First North, Logan, Utah 84321.
